Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

October Term, 1995

ARNOLD D. BERKELEY,

Petitioner,

v.

HOME INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX TO PETITION FOR CERTIORARI

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 1995 Decided November 3, 1995

No. 94–7149

ARNOLD D. BERKELEY,
APPELLANT

v.

HOME INSURANCE COMPANY,
APPELLEE

Consolidated with
94–7167

Appeals from the United States District Court
for the District of Columbia
(No. 93cv00254)

Richard I. Chaifetz argued the cause for appellant/cross appellee Arnold D. Berkeley. With him on the briefs was *Sherman L. Cohn.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Aaron L. Handleman argued the cause for appellee/cross appellant Home Insurance Company. With him on the brief was *Jack A. Gould.*

Before: WALD, SILBERMAN and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: These appeals involve an attorney and the insurance company that issued him a professional liability insurance policy. When the company refused to defend the attorney against a counterclaim filed by his former client in an arbitrated fee proceeding, the attorney hired other counsel and ultimately prevailed in large part, recovering substantial additional fees from his former client, but was also ordered to remit 15% of his recovery to the client. The attorney subsequently sued the insurance company for breach of contract, seeking reimbursement of the costs of defending the counterclaim and other expenses, and for a declaratory judgment that the insurance company was obligated to indemnify him for the 15% ordered remitted to the client. The district court granted the attorney's motion for summary judgment on count one of the complaint, for reimbursement of expenses for defending against the counterclaim, but granted the insurance company's motion to dismiss count two, for reimbursement of the 15% remittal. The district court ordered the insurance company to pay the attorney slightly over four hundred thousand dollars plus prejudgment interest.

The attorney, Arnold D. Berkeley, appeals on the ground that the district court erred in calculating the amount of reimbursement under count one and in dismissing count two on the ground that the insurer was not liable for the 15% remittal under an exclusionary clause in the policy for "dishonest" conduct. The insurance company, Home Insurance Company, appeals the grant of summary judgment to Berkeley on count one in view of its request for additional discovery pursuant to Federal Rule of Civil Procedure 56(f) and its claim that there were material facts in dispute; it also appeals the reimbursement amount to the extent that the

award included Berkeley's in-house counsel costs. We affirm the grant of summary judgment on count one and the dismissal of count two based on the provision in the exclusionary clause for "deliberately wrongful" conduct. We also affirm the reimbursement order except to the extent that the district court denied any recovery for costs associated with the former client's appeals of the arbitration panel's award.

I.

In 1971 Berkeley began to represent Arizona Electric Power Cooperative, Inc. ("AEPCO") in matters relating to natural gas service provided to it by El Paso Natural Gas Company, an interstate pipeline. Berkeley agreed in the late 1970s to represent AEPCO in a tort and breach of contract action for damages against El Paso. AEPCO and Berkeley entered into a contingent fee agreement in January 1979 whereby Berkeley would receive a fixed fee plus a contingent fee equal to specified percentages of any actual recovery from El Paso; the agreement also contained an arbitration clause for resolution of all disputes.[1] The case was settled in December 1980, and El Paso provided substantial non-monetary benefits to AEPCO. In 1982, AEPCO and Berkeley amended the contingency fee agreement to provide that certain benefits received by AEPCO from El Paso were obtained in settlement of the damages claim, and AEPCO paid Berkeley a total of $2.75 million in contingent fees.

Although Berkeley received contingent fee payments from AEPCO from 1982 to 1991 with regard to certain of these non-monetary benefits, he maintained that AEPCO did not begin to benefit from certain other non-monetary benefits until the late 1980's and never paid him contingent fees with respect to those benefits. In May 1991, Berkeley initiated an arbitration proceeding in which he sought eventually more than $67 million in additional fees. AEPCO denied that it owed any fees and fired Berkeley as its lawyer.

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[1] Section XIII provided that the agreement would continue in existence were either party to invoke arbitration to settle any disagreement about their respective rights and obligations.

AEPCO sued Berkeley and his firm for legal malpractice in the United States District Court for the District of Arizona in August 1991 because of Berkeley's continued representation of the City of Willcox, a former co-client with AEPCO. From at least 1989 until the time he ceased practicing law in 1992, Berkeley purchased professional liability insurance from Home. Home agreed to defend the lawsuit, which included an allegation of Berkeley's violation of canons of ethics by reason of conflicts of interest. In October 1991, AEPCO voluntarily dismissed this lawsuit without prejudice. Then, in March 1992, AEPCO filed a counterclaim against Berkeley in the fee arbitration proceeding alleging that Berkeley had violated his fiduciary duty to his client as a result, in part, of a conflict of interest due to his representation in litigation of the City, which had taken positions adverse to AEPCO.

The counterclaim requested that the 1982 amendment to the contingent fee agreement be declared null and void because of Berkeley's alleged fraud in procuring it, and that Berkeley return all contingent and non-contingent fee payments and be required to disgorge all fees paid since 1979 and all hourly legal fees since the agreement had expired in June 1981. In addition, the fifth and sixth prayers for relief sought to bar Berkeley from recovering additional fees from AEPCO under the contingent fee agreement and to reimburse AEPCO for its costs in defending the fee demand by reason of Berkeley's admission that it was excessive and his conflict of interest in representing the City after he was fired by AEPCO. Finally, the counterclaim sought for AEPCO such other measure of recovery as the arbitration panel thought appropriate. Berkeley tendered the counterclaim defense to Home. Home refused to provide a defense, contending that the only relief AEPCO sought was the return of legal fees, which was excluded from coverage under the policy. Berkeley arranged for the law firm of Steptoe and Johnson, which had defended him against AEPCO's legal malpractice lawsuit, to defend him against the counterclaim.

Following a hearing, the arbitration panel awarded Berkeley $9.221 million in contingent fees, but ordered him to remit 15% of the award to AEPCO in view of conduct that the panel

determined was "below the level of propriety expected of a member of the Bar."[2] Home refused Berkeley's requests for reimbursement of the costs of his defense and the remittal amount. AEPCO went to court to have the arbitration panel's award vacated. The United States District Court for the District of Arizona confirmed the award in May 1993, rejecting AEPCO's argument that the court should adopt a public policy exception precluding disloyal attorneys from receiving compensation from the betrayed client, and finding, in any event, that AEPCO had failed to show an established "public policy barring the payment of legal fees earned more than seven years prior to the attorney's ethical transgressions." The Ninth Circuit affirmed on July 12, 1995. *Arizona Elec. Power Co-Op., Inc. v. Berkeley,* 59 F.3d 988 (9th Cir. 1995).

Meanwhile, on February 9, 1993, Berkeley filed the instant lawsuit against Home alleging breach of contract in count one, and seeking a declaratory judgment for indemnification in count two.[3] Home filed a motion on April 15, 1993, to dismiss the complaint and Berkeley filed a motion for partial summary judgment on May 18, 1993. Home filed an opposition to the motion for summary judgment on June 21, 1993. On October 5, 1993, the district court held a hearing on the

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[2] The arbitration panel found three instances of such conduct: (1) employing AEPCO's former general manager to assist in the preparation of the additional fee claim while continuing to represent AEPCO and without notifying AEPCO; (2) filing the arbitration demand for fees in excess of $67 million without first consulting with AEPCO; and (3) continuing to represent the City "in a litigation in which the City was attempting to hold [AEPCO's] gas supply hostage." Only the conflict of interest in representing the City after being fired by AEPCO was determined by the Bar Counsel of the District of Columbia to be a violation of the D.C. Rules of Professional Conduct.

[3] Because AEPCO's appeal of the arbitration award was still pending in the Ninth Circuit when Berkeley filed his complaint in the instant case, Berkeley sought a declaration that Home would be liable to indemnify him if and when he had to pay the counterclaim award to AEPCO.

motions and directed the parties to file supplemental pleadings on three discrete issues. Berkeley filed its supplemental memorandum in support of partial summary judgment on November 4, 1993. On December 6, 1993, Home filed its supplemental opposition to summary judgment and a supplemental statement of material facts in dispute. Two days later it filed a notice to take Berkeley's deposition, and the district court granted Berkeley's motion for a protective order on December 20, 1993. Thereafter, on January 26, 1994, the district court granted Berkeley's motion for partial summary judgment on count one and granted Home's motion to dismiss count two. After denying Berkeley's motion for clarification regarding recovery of costs for AEPCO's appeals of the arbitration panel award, the district court ordered Home to pay Berkeley $404,260.23 plus prejudgment interest. Both parties appeal, and our review is de novo. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994); *Koval v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

II.

Berkeley's appeal raises two main issues. First, he contends that the district court erred in ruling that Home could avoid liability for the 15% remittal to AEPCO because his conduct fell within the policy exclusion for "dishonest" conduct. He maintains that neither the conflict of interest involving the City nor the other conduct found improper by the arbitration panel is "dishonest" or "deliberately wrongful" conduct within the exclusion. Second, Berkeley contends that the district court erred in failing to award him additional reimbursement and attorneys fees in the instant case. Because there would be no occasion to address these contentions if Home's appeal succeeds, we address Home's appeal first.

A. Home's appeal.

1. **Construction of policy.** Home contends that the relief AEPCO requested in the counterclaim against Berkeley was limited to the return of fees, which the policy did not require Home to defend. This argument is quickly disposed

of. The policy required Home to defend Berkeley against "any claim ... seeking damages to which this insurance applies" and "[t]o pay ... all sums ... which the Insured shall become legally obligated to pay as damages ... by reason of any act, error, or omission in professional services rendered." The term "damages" is defined to mean "a monetary judgment or settlement and does not include ... the return of or restitution of legal fees, costs and expenses arising therefrom." In concluding that Berkeley's breach argument was well taken, the district court correctly noted that:

> [t]he counterclaim includes demands not only for remission of the fees already paid but also for relief from any obligation to pay "additional fees." In addition, the counterclaim sought to require [Berkeley] to pay [AEPCO's] "attorneys fees in defending against [Berkeley's] excessive fee demand." Neither of these items may fairly be described as a claim for "the return or restitution of legal fees" as that phrase is used in the insurance contract.

Rejecting Home's further argument, the district court stated that "[a]n award relieving a party from an obligation to pay money does not differ in practical effect from an award of money damages. Thus, the client's request for relief from 'additional fees' sought 'a monetary judgment or settlement.' "

The district court's analysis is dispositive. *See American Home Assur. Co. v. Miller*, 717 F.2d 1310, 1312 (9th Cir. 1983). Moreover, AEPCO's prayer for attorneys fees was not a request for "the return or restitution of legal fees" within the meaning of the contract. *See Weisberger v. Home Ins. Co.*, 601 N.E.2d 660, 663 (Ohio App. 1991) (construing same exclusionary clause).

2. Misrepresentation as a material disputed factual issue. Home next contends that there was a material disputed fact whether Berkeley's insurance policy was voidable by reason of a misrepresentation in his renewal application. *See* D.C. Code Ann. § 35–414; *Jones v. Prudential Ins. Co.*, 388 A.2d 476, 481 (D.C. 1978); *Hill v. Prudential Ins. Co.*, 315

A.2d 146, 147–48 (D.C. 1974). In its supplemental Rule 108(h) statement of disputed material facts, Home asserted that Berkeley "knew of a potential professional liability claim against him when his firm made an affirmative representation that it knew of no such circumstance as could give rise to a potential claim against the firm in [the application and renewals and in] letter[s] to Administrative Associates, Inc." One of the letters in question was signed three days before Berkeley filed his arbitration proceeding. Home also argues that a 1988 letter to Berkeley from AEPCO's former general manager, warning Berkeley to "be prepared for the explosion" should he contest his contingent fee, put Berkeley on notice that AEPCO would fire him if he made a fee claim against it. The district court, in its discretion, could properly reject Home's belated attempt to reopen its original opposition to the motion for summary judgment. *Cf. Liberles v. County of Cook*, 709 F.2d 1122, 1129 (7th Cir. 1983).

Home first raised the misrepresentation issue in its supplemental opposition to Berkeley's summary judgment motion. Its supplemental opposition was filed on December 6, 1993, after the district court, during the October 5, 1993, hearing on the motions to dismiss and for summary judgment, instructed the parties to file supplemental briefs on three discrete issues.[4] This was more than six months after Berkeley filed his motion for summary judgment, and long after the time for filing an opposition and a Rule 108(h) statement of material disputed facts had expired. D.D.C. Rule 108(b). The supplemental opposition was not responsive in this regard to the district court's October 5 instructions. It was filed just before the district court was about to rule on the cross motions for summary judgment.

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[4] The supplemental briefs were to address: (1) whether prayers five and six in AEPCO's counterclaim would impose liability on Berkeley which was not the disgorgement of legal fees; (2) any documentation available from prior proceedings to show the ingredients of the $9 million arbitration award; and (3) whether a conflict of interests is dishonest conduct under the policy.

Nor can Home's untimely raising of a new issue be excused on the basis of a claim of newly discovered evidence, as Home argued to the district court. *Cf. United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469, 476 (D.C. Cir.) (Fed. R. Civ. P. 60(b)), *cert. denied* 118 S. Ct. 3040 (1993). Home had all of the records on which it relied in raising the misrepresentation claim in its supplemental opposition before it filed its original opposition to summary judgment on June 21, 1993. Berkeley submitted an undisputed affidavit that his counsel had offered as early as March 1993 to make available to Home's counsel all of the arbitration proceedings documents and Home had not responded. Nor, apparently, did Home seek to obtain the documents on its own from the arbitration panel. Thus, not only was the evidence available to Home through Berkeley's offer, but the application and renewals and at least the May 21, 1991, letter in which Home claims Berkeley made a misrepresentation were in Home's possession.

3. **Rule 56(f).** Finally, Home contends that the district court erred in denying its request for time in which to conduct discovery to support its claim that there was a genuine issue of material fact whether Berkeley had made a material misrepresentation in his application, renewals, and letters.[5]

As the Supreme Court has noted, summary judgment should be entered "after adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Thus, the Fifth Circuit holds that Rule 56(f) motions should be granted "almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence." *Wich-*

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[5] Fed. R. Civ. P. 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

ita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 n.4 (5th Cir. 1992) (citations omitted), *cert. denied*, 113 S. Ct. 2340 (1993). Notwithstanding the usual generous approach toward granting Rule 56(f) motions, the rule is not properly invoked to relieve counsel's lack of diligence. *Id.* at 919. Were that allowed, the rationale underlying the summary judgment procedure would be undermined, as counsel belatedly devised new theories to delay resolution of long-pending dispositive motions. *See Celotex*, 477 U.S. at 327 (citing Fed. R. Civ. P. 1). Home has failed to show reasons for its untimeliness. *Cf. Morrisey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 35 (1st Cir. 1995).

Nothing in the record suggests that Home confronted any difficulty in obtaining the information that it needed to develop its misrepresentation claim that would have prevented it from timely filing its opposition and Rule 108(h) statement. Home did not identify the reason that it was only "now" learning of the alleged misrepresentation. Indeed, it did not notice Berkeley's deposition until after it filed its supplemental opposition in December, 1993.[6] Furthermore, when Home filed its supplemental opposition, it had already received the arbitration proceeding documents. Home failed to advise the district court, by affidavit, of its continuing need for additional discovery at this late date. Under the rule, bare assertions of need will not suffice when the record reveals none. *Cf. First Chicago Int'l v. United Exch. Co., Ltd.*, 836 F.2d 1375, 1380 (D.C. Cir. 1988). Thus, we find no abuse of discretion by the district court in denying Home's Rule 56(f) motion for further discovery. *See Exxon Corp. v. FTC*, 663 F.2d 120, 129 (D.C. Cir. 1980).

Accordingly, because the district court did not abuse its discretion by disallowing Home's untimely reopening of its

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[6] Home stated in its supplemental opposition that it would be noticing depositions of Berkeley and members of his firm and, depending on the information in the depositions, might depose another firm member; the depositions would have been "directed not only at the issue of the application, but also to establish that [Berkeley] acted dishonestly and that his conduct was deliberately wrongful."

opposition to summary judgment or by denying its Rule 56(f) motion, Home failed to proffer evidence on which a reasonable jury could find that Berkeley had misrepresented the state of his knowledge in the application, renewals and letters, and summary judgment was properly granted on count one of the complaint. *See Shields v. Eli Lilly Co.*, 895 F.2d 1463, 1465 (D.C. Cir. 1990) (citations omitted). We turn to the issues raised in Berkeley's appeal.[7]

B. Berkeley's appeal.

1. Remittal of 15% of arbitrated fee award. Home successfully argued in the district court that an exclusion in the policy prevents Berkeley from recovering from Home the portion of the arbitration award ordered remitted to AEPCO. We review this question of law de novo. *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Cuddy v. Carmen*, 762 F.2d 119, 123 (D.C. Cir.), *cert. denied*, 474 U.S. 1034 (1985).

The policy contains an exclusion for:

> any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured.

The district court concluded that "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision." Berkeley maintains that the district court's finding of "dishonest" conduct was wrong because the arbitration panel did not make that finding, the Bar Counsel of the District of Columbia imposed the lightest possible sanction for the conflict of interest violation, and the cases hold that a conflict of interest is not fraudulent or dishonest conduct.[8]

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[7] We address Home's contention regarding the award of in-house attorneys fees in Part II(B)(2)(e), *infra*.

[8] Berkeley, however, cites only *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co.*, 832 F.2d 1358, 1370 (5th Cir.) (holding that constructive fraud claim does not fall within

We need not decide whether the "improprieties" noted by the arbitration panel and the conflict of interest found by D.C. Bar Counsel constituted "dishonest" conduct within the meaning of the exclusionary clause. There is some supporting authority applicable to a member of the District of Columbia Bar. *Cf. Matter of Shorter*, 570 A.2d 760, 767–68 (D.C. 1990); *see also FDIC v. Mmahat*, 907 F.2d 546, 552–53 (5th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991). But, in any event, we do not think it can be seriously disputed that Berkeley's conduct falls within the policy exclusion for "deliberately wrongful" conduct.

District of Columbia Bar Disciplinary Rule 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Berkeley was hired by the City after being fired by AEPCO and on behalf of the City argued a position in litigation that was directly contrary to the interests of his former client. The City had a special status under federal regulations, whereby it was entitled to an uninterrupted gas supply from

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exclusion for claims arising from "fraudulent" acts), *opinion clarified in other respects per curiam*, 832 F.2d 1378 (5th Cir. 1987); *State v. Kopke*, 502 P.2d 813, 817 (Kan. 1972) (holding in attorney disciplinary proceeding that conflict of interest violating code of ethics did not amount to fraud, dishonesty or moral turpitude); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209 (Minn. 1984) (holding that exclusion for fraud did not encompass constructive fraud because "[t]he mere breach of an ethical rule should not fall within the exclusion unless accompanied by 'dishonesty' or 'fraud' ") (citing Ronald Mallen & Victor Levit, *Legal Malpractice*, § 718 at 900 (1981)); *Sade v. National Sur. Corp.*, 203 F. Supp. 680, 684 (D.D.C. 1962) ("dishonest" act within provision of surety bond requires "element of moral turpitude or want of integrity") (quoting *Commercial Banking Corp. v. Indemnity Ins. Co.*, 1 F.R.D. 380, 382 (E.D. Pa. 1940)), *aff'd per curiam*, 314 F.2d 286 (D.C. Cir. 1963).

El Paso. AEPCO bought its gas through the City rather than directly from El Paso so that it too could receive the special benefits. After firing Berkeley, AEPCO attempted to separate itself from the City and buy gas directly from El Paso. Berkeley represented the City in opposing this action by AEPCO.

Berkeley's position before the arbitration panel and Bar Counsel was that although his firm had represented AEPCO in contract negotiations with the City, the firm "had not participated in the drafting or negotiation of the contract provision in question," which governed the right of the City to exercise or withhold its consent in the event that AEPCO sought to purchase directly from El Paso. Bar Counsel rejected this interpretation of the disciplinary rule, stating that even if Berkeley's firm had not drafted the provision at issue, "[t]he application of the Rule does not depend upon the prior imparting of advice, but upon the subsequent representation of interests materially adverse to those of the former client in the same or substantially related matter." Bar Counsel also disagreed with Berkeley's view that his argument for the City—that it could object to AEPCO's dealing directly with El Paso—was not substantially related to his prior representation of AEPCO: "[t]hat position bore a direct and substantial relationship to the dealings among the three entities with which a significant portion of [Berkeley's] representation of AEPCO had concerned itself."

Notwithstanding the obligation to construe insurance contracts favorably to the insured and to construe exclusionary clauses narrowly, *see, e.g., Continental Cas. Co. v. Cole*, 809 F.2d 891, 895 (D.C. Cir. 1987); *Potomac Elec. Power Co. v. California Union Ins.*, 777 F. Supp. 968, 974–75 (D.D.C. 1991), neither Berkeley nor this court can ignore the plain language of the disciplinary rule and the context of Berkeley's disregard of the rule. While some conflicts of interest undoubtedly present difficult and close questions, as Berkeley's ethics expert opined, the conflict described by Bar Counsel did not. To suggest that the direct purchase issues for AEPCO and the City were not substantially related would be to mock Rule 1.9. Whether AEPCO could purchase directly

from El Paso without the City's consent was an issue that Berkeley addressed one way for his former client and another way after he was fired and proceeded to represent the City against the former client in litigation. The conflict of interest was clear to all entities that considered it,[9] including the district court here and, most importantly since Berkeley is a member of the District of Columbia Bar, the D.C. Bar Counsel.[10] Bar Counsel did not equivocate in finding a violation of the Rule, and the imposition of a sanction necessarily implied that Berkeley's violation of the Rule was knowing and intentional. *See In re James*, 452 A.2d 163, 166 (D.C. 1982), *cert. denied*, 460 U.S. 1038 (1983). Berkeley's own ethics expert, Professor Stephen Gillers, concluded that if Berkeley had advised AEPCO that it had the right under the 1985 service agreement with the City to become a direct customer of El Paso without any interference from the City, Berkeley's firm "should not oppose the former client in an action over the construction of a clause that the firm had previously construed for the client. This would be so even if the firm had not drafted the clause," and the firm must be disqualified. So blatant a violation can only be considered deliberate.

The conflict of interest violation did not occur in a vacuum. In his pleadings Berkeley described himself as an experienced regulatory attorney, concentrating in public utility regulatory matters before the Federal Energy Regulatory Commission ("FERC") (and its predecessor the Federal Power Commission). He began representing AEPCO in 1971 before the Commission in matters relating to natural gas service

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[9] The district court in Arizona assumed that the conflict existed and did not review the findings of the arbitration panel.

[10] *See* D.C. Bar R. XI § 6(a)(2) and (3) (Bar Counsel has "the power and duty [t]o investigate ... [and] to dispose of all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of the Court, by dismissal or informal admonition or by referral of charges."); *id.* § 1(a) ("Persons subject to disciplinary jurisdiction [include] [a]ll members of the District of Columbia Bar").

provided to it by El Paso. He drafted the contract by which AEPCO purchased El Paso power through the City, and jointly represented both parties thereafter. When AEPCO fired him, he had represented AEPCO and the City for more than a decade. He was, therefore, in a position to understand thoroughly their positions and interests with regard to uninterrupted access to El Paso power. The fact that Berkeley's firm researched the conflict of interest issue cannot be dispositive; otherwise, a self-interested conclusion would deprive the "deliberately wrongful" conduct provision in the exclusionary clause of the policy of any reasonable meaning where there is a disciplinary rule violation. Because his advocacy of the City's interpretation of the service contract occurred after AEPCO denied that he was entitled to additional fees and fired him, and because the interpretation concerned a critical issue for both parties that Berkeley had addressed over the years, neither inadvertence nor simple negligence nor a mere "impropriety" is at issue. Were we to assume, for purposes of argument, that the violation of the disciplinary rule itself was merely negligent, the context shown by the record nevertheless warrants the conclusion that Berkeley's conduct in arguing a position adverse to his former client was deliberately wrongful.[11]

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[11] In opining on the "propriety" of Berkeley's conduct, AEPCO's ethics expert, Professor Geoffrey C. Hazard, Jr., testified before the arbitration fee panel, in response to a hypothetical question by AEPCO's counsel, that:

> I do have an opinion and it is based not only on the Rules of Professional Conduct but the rules of law that govern the lawyer's responsibility. These govern him in his civil relations apart from the prospect of discipline, and they also reflect recognized standards of practice.
>
> The principle is that, having represented a client in a matter, whether alone or jointly, you may not thereafter undertake a representation adverse to the client in the matter in which you had represented him.

Professor Hazard cited in support "a classic case of attacking your own work, well known in the profession" where a professor drafted

Berkeley's other argument, that the exclusionary clause is ambiguous and, construed most favorably to the insured, excludes coverage only for acts that are dishonest, fraudulent, criminal *and* wrongful, fares no better. His interpretation results in a strained reading of the clause and renders words superfluous: an act that is fraudulent or criminal is also wrongful. *See Combined Ins. Co. of Amer. v. McGillen*, 316 A.2d 854, 856 (D.C. 1974); *Boggs v. Motors Ins. Corp.*, 139 A.2d 733, 735 (D.C. 1958); *American Home Assur. Co. v. J.F. Shea Co., Inc.*, 445 F. Supp. 365, 368 (D.D.C. 1978). In addition, Berkeley's contention that Home was estopped from relying on the exclusionary clause fails for the reason stated by the district court, and not confronted by Berkeley in his briefs on appeal. Unlike the insurers in the cases on which Berkeley relies,[12] Home does not contend that Berkeley's failure to perform a condition after Home refused the tendered defense justified its later refusal to indemnify; rather, Home invokes a circumstance that existed before its own breach of the contract. Berkeley's interpretation would extend the scope of bargained-for coverage. *See Union Trust Co. v. Continental Cas. Co.*, 194 F.2d 901, 902 (D.C. Cir. 1952); *Boonton Handbag Co., Inc. v. Home Ins. Co.*, 310 A.2d 510 (N.J. Super. Ct. App. Div. 1973).

Finally, Berkeley's contention that the district court's decision would undermine indemnity coverage in every professional insurance policy because "virtually every act which a lawyer can commit which would sustain a finding of professional liability in some way violates the Rules of Professional Conduct," and thus "lawyers charged with malpractice [could] never look to the indemnity protection of their professional liability insurance" comes close to pure hyperbole. First, the court has long made clear that the duty to defend is broader than the obligation to indemnify. *See, e.g., Cole*, 809 F.2d at

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a will and after the testator died, participated in a legal attack on the will.

[12] *St. Louis Beef Co. v. Maryland Cas. Co.*, 201 U.S. 173 (1906); *American Fire & Cas. Co. v. Kaplan*, 183 A.2d 914, 915–16 (D.C. 1962).

898. An insurer who refuses to defend risks being held responsible for indemnification for the insured's defense costs over which it had no control; indeed, Home complains that Berkeley seeks reimbursement for attorney's fees based on excessively high hourly rates. Consequently, the prudent insurer will be unlikely to deny coverage under an exclusionary clause in the absence of clear evidence of its application, either by reason of blatant misconduct falling within the terms of the clause or a confirming source, such as a court or Bar Counsel. The courts, in turn, will look at the context of the intentional conduct evidenced by the disciplinary rule violation. *See* cases cited *supra* n.8.

Second, there are some things that lawyers do that insurance companies will not insure against. At least in Berkeley's case the combination of the language of Rule 1.9, his professional expertise in a particular regulatory setting over a number of years in which he represented the parties' interests with respect to uninterrupted access, and the language of the exclusionary clause gave him fair warning. While we do not adopt a *per se* rule, holding that every violation of Rule 1.9 will constitute "deliberately wrongful" conduct, and we express no opinion on the remedy imposed by the arbitration panel,[13] Berkeley has not shown, in the absence of a reasonable interpretation of the exclusionary clause in his favor, why he should be allowed to avoid the language of the contract for which he bargained. Although the arbitration panel relied on two additional improprieties as a basis for liability, because it is sufficient under the policy that the counterclaim award "[arose] out of" conduct by Berkeley that was "deliberately wrongful," we need not decide if the other improprieties fall within the exclusionary clause.

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[13] A dissenting member of the arbitration panel thought that "the facts of [Berkeley's] representation of [the City of] Willcox appear to be vastly overblown—assuming disqualification was required, it has already been accomplished by the Arizona court, which imposed no other sanction," and found no basis for finding that Berkeley's conduct had damaged AEPCO in any monetary amount. D.C. Bar Counsel imposed the sanction of an informal admonition under D.C. App. Bar Rule XI §§ 3, 6 and 8.

For these reasons we conclude that Berkeley's conflict of interest falls within the "deliberately wrongful" conduct language of the exclusionary clause in the policy and that Home's motion to dismiss count two of the complaint was properly granted.

2. **Amount of award.** Berkeley also makes several challenges to the amount of the reimbursement award. We conclude that only his claim for reimbursement in connection with AEPCO's appeals of the arbitration panel award requires further consideration by the district court. *See Safer v. Perper*, 569 F.2d 87, 100 (D.C. Cir. 1977).

a. Costs of AEPCO's appeals of the arbitration award. The district court ruled, in denying a motion for clarification, that Home was not required to pay for Berkeley's effort to defend a favorable award against judicial review because under the policy Home was obligated "only for 'any claim *against* [Berkeley] including the appeal thereof.'" Berkeley maintains, persuasively in our view, that AEPCO's appeals to the Arizona district court and the Ninth Circuit are no different and raise no different issues than if AEPCO had filed a separate damage action against Berkeley and lost. *Cf. Miller*, 717 F.2d at 1312. The Ninth Circuit's opinion disposing of AEPCO's appeal makes clear that AEPCO's effort to prevail on the counterclaim was so closely intertwined with the merits, *see Arizona Elec. Power Co-op., Inc. v. Berkeley*, 59 F.3d at 991–92, that Berkeley is entitled to reimbursement for the costs of the appeals.

b. Increased contingent fee. Berkeley less persuasively maintains that Home was obligated to pay the increased contingent fee that Berkeley had to pay to Steptoe and Johnson when Home declined to defend him against the counterclaim. We find no clear error by the district court in concluding that the increase was a cost of prosecuting the fee claim. The agreement was not materially altered after the counterclaim was filed; the contingent fee was tied to Berkeley's affirmative case. On the other hand, the district court agreed that Berkeley could recover for the risk he undertook

by recovering on the basis of Steptoe and Johnson's full, rather than its reduced, billing rate.

c. All costs of affirmative case. Berkeley also contends that Home was required to reimburse him for all of the costs of his affirmative case after AEPCO filed its counterclaim because of the substantial overlap. He maintains that once AEPCO filed its counterclaim almost all of the costs were for the counterclaim except for valuation, which overlapped the counterclaim and his affirmative case. Hence, he continues, because in reality he was the defendant who had to overcome AEPCO's assertion that his request for additional fees was fraudulent, the district court erred in awarding only the separate costs associated with the counterclaim rather than including overlapping hours.

The district court could properly reject the position that Berkeley was entitled to reimbursement of any expenses he would have had in the absence of the counterclaim, noting that the case on which Berkeley relies, *Voorhees v. Preferred Mut. Ins. Co.*, 588 A.2d 417 (N.J. Super. Ct. App. Div. 1991), *aff'd*, 607 A.2d 1255 (N.J. 1992), involved the refusal to segregate distinct defense costs and not defense from prosecution costs. Berkeley's reference to the provision in the policy requiring Home to "defend *any* claim" does not demonstrate error by the district court. Although, as Berkeley correctly notes, the policy is, at least in one sense, without limitation and does not call for the apportionment of costs, the distinction drawn by the district court is consistent with the policy limitation to which Berkeley refers. We find no clear error in its application.

d. Additional expert witnesses. The same reasoning applies to Berkeley's contention that the costs for two additional expert witnesses should have been included in the award because the valuation and counterclaim issues overlapped. The district court allowed reimbursement for the costs of Berkeley's two legal ethics experts, noting that three of the five witnesses for whose costs Berkeley sought reimbursement were experts in the field of energy law and "presumably would have been necessary absent the counter-

claim." Berkeley has shown no clear error. He retained the two valuation experts prior to the filing of the counterclaim. Indeed, Berkeley admits in his brief on appeal that had the counterclaim not been filed, the two valuation witnesses would have testified. His argument that they were needed once AEPCO challenged Berkeley's claim that it had received benefits fails in the absence of any showing of how much of their time was devoted to the counterclaim.

e. In-house counsel costs. Berkeley was unable to provide contemporaneous time sheets for in-house counsel, and the district court awarded 50% of the costs in light of post-hoc recollections two years after the fact and methodologically flawed estimates. On appeal, Berkeley has not shown that the district court clearly erred in not using an apportionment formula. While the district court observed that the rule on contemporaneous time sheets in *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982), did not govern the calculation of damages, it correctly observed that "the concerns that case raises weigh against awarding [Berkeley] the full amount he seeks for his partners' work." Berkeley posits that the failure to have such time sheets is attributable in part to Home's improper declination of coverage when the counterclaim was filed, and in part to the fact that once AEPCO fired Berkeley, he was his firm's only client. The district court's resolution of the matter—rewarding the work done without providing a windfall—was based on a correct legal standard and we find no clear error. Home's argument, that Berkeley is not entitled to reimbursement for these costs because in-house counsel were obligated under the policy to assist in the defense, ignores the fact that the counterclaim was filed against Berkeley only, not his partners, and hence they did not face being held liable to AEPCO.

f. Out of pocket costs. Berkeley also contends that he was entitled to recover a portion of his out-of-pocket office costs based on the same allocation formula that the district court approved in granting reimbursement of Steptoe and Johnson's out-of-pocket costs for the counterclaim. Home maintains that Berkeley never presented evidence to show

that these costs, including meals, taxis, telephone calls and the fee paid to the American Arbitration Association, were related to his counterclaim rather than his fee claim. The district court included in the award one-half of the requested amount of $77,412.79 for Berkeley's office expenses. The record on which Berkeley relies shows that Berkeley's bookkeeper estimated out of pocket expenses as $24,653.33, of which $18,416.04 was attributable to the counterclaim. Thus, we find no clear error by the district court.

Accordingly, we affirm the grant of summary judgment on count one and the dismissal of count two of the complaint.[14] We also affirm the reimbursement order except to the extent that the district court denied any recovery of costs associated with AEPCO's appeals of the arbitration award; we remand for assessment of those costs.

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[14] We find no abuse of discretion by the district court in denying Berkeley fees for the instant case. *See Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985). Home had reason to believe that Berkeley's conduct fell within the exclusionary clause. *Cf. Siegel v. William E. Bookhultz & Sons, Inc.*, 419 F.2d 720, 722–24 (D.C. Cir. 1969).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1995

USDC CV 93-0254

No. 94-7149

Arnold D. Berkeley,

Appellant,

v.

Home Insurance Company,

Appellee

and consolidated cross-appeal No. 94-7167

[United States Court of Appeals for the District of Columbia Circuit, FILED Dec 21, 1995 (Clerk's stamp)]

BEFORE: Wald, Silberman and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed December 1, 1995, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

MEMORANDUM

[FILED, Jan 26, 1994, Clerk, U.S. District Court, District of Columbia (Clerk's stamp)]

Plaintiff, an attorney whose former client entered a claim against him in an arbitration proceeding, claims that defendant, his professional liability insurer, breached their insurance contract by failing to represent him in the arbitration proceeding (Complaint, Count I). Plaintiff also seeks a declaratory judgment that defendant is obligated to indemnify him for the amount the arbitrators ordered him to pay his former client (Complaint, Count II). Defendant claims that the insurance policy did not require it to represent plaintiff under the circumstances presented. Defendant has moved to dismiss, and plaintiff has moved for partial summary judgment on liability. For the reasons set forth in this Memorandum, the accompanying Order grants plaintiff's motion for summary judgment as to Count I and dismisses Count II.

I.

Plaintiff and his client were parties to a contingent fee agreement. After several years of an attorney-client relationship, governed by the agreement, in which plaintiff represented his client before the Federal Energy

Regulatory Commission and other tribunals with respect to the client's natural gas business, the client failed to pay fees plaintiff presented to it and terminated their relationship. The agreement contained an arbitration clause. Shortly before the client terminated the relationship, plaintiff filed a demand for arbitration, claiming that the client had failed to pay fees the agreement required of it.

The client filed a counterclaim before the arbitrators alleging generally that plaintiff had violated his fiduciary duty to his client by, among other things, committing a serious conflict of interest by representing an adversary of the client. The counterclaim sought as relief (1) recovery of several million dollars in fees that it had paid the plaintiff over the years and (2) an order from the arbitrators barring plaintiff "from recovering additional fees" and for reimbursing the client "for its attorneys fees in defending against [plaintiff's] excessive fee demand." Complaint, ex. B, at 21. Plaintiff requested that defendant provide him representation in the arbitration proceeding against the counterclaim. Defendant refused, claiming that the relief the client requested in the counterclaim was limited to return of legal fees, a remedy against which the insurance policy did not require defendant to defend plaintiff.

The policy places a duty on the carrier to defend the insured against "any claim . . . seeking damages to which this insurance applies." Complaint, ex. A, at 12, and "[t]o pay . . . all sums . . . which the insured shall become legally obligated to pay as damages . . . by reason of any act, error, or omission in professional services rendered." *Id.* at 11. The policy defines "damages" as follows:

> Damages, whenever used in this policy, means a monetary judgment or settlement and does not include . . . the return or restitution of legal fees, costs and expenses arising therefrom.

Id. at 12. In addition, the policy contains an exclusion for

> any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured. However, notwithstanding the forgoing, the Company will provide a defense for any such claims without any liability on the part of the company to pay such sums as the Insured shall become legally obligated to pay as damages.

Id. at 14.

A majority of the arbitrators (the arbitrator selected by plaintiff and the independent arbitrator) awarded plaintiff $9,225,000. However, another majority (the arbitrator selected by the client and the independent arbitrator) directed plaintiff "to remit 15% of the award . . . to respondent in satisfaction of the counterclaim herein." Complaint, ex. D, at 2. The decision to direct the 15% remission was justified because plaintiff had engaged in "conduct below the level of propriety expected of a member of the Bar," including the conflict of interest. *Id.*

Plaintiff again contacted defendant, requesting that defendant reimburse his costs in defending the counterclaim and represent him in the arbitration enforcement action before the United States District Court in Arizona. Defendant again refused on the same ground as previously. The District Court confirmed the order of the arbitrators. *Arizona Electric Power Cooperative, Inc. v. Berkeley*, No. CIV 92-681 (D. Ariz. July 23, 1993).

II.

Plaintiff's claim for the expenses incurred in defense of the counterclaim is well taken. The counterclaim included demands not only for remission of the fees

already paid but also for relief from any obligation to pay "additional fees." Complaint, ex. B, at 21. In addition, the counterclaim sought to require plaintiff to pay his client's "attorneys fees in defending against [plaintiff's] excessive fee demand." *Id.* Neither of these items may fairly be described as a claim for "the return or restitution of legal fees" as that phrase is used in the insurance contract. Because the counterclaim requested relief other than the return of legal fees, defendant breached its insurance agreement with plaintiff when it failed to provide him with a defense before the arbitrators. Accordingly, plaintiff is entitled to recover his expenses incurred in providing his own defense.

Defendant argues that the client's request for relief from "additional fees" did not constitute a prayer for "a monetary judgment or settlement" and therefore does not come within the policy's definition of "damages." An award relieving a party from an obligation to pay money does not differ in practical effect from an award of money damages. Thus, the client's request for relief from "additional fees" sought "a monetary judgment or settlement." Even if the client had not sought relief from "additional fees," the insurance contract would still have required defendant to provide plaintiff with a defense, because the counterclaim's prayer for attorney's fees was not a request for "the return or restitution of legal fees" within the meaning of the contract.[1]

With respect to indemnification, defendant correctly invokes the insurance contract's exclusion of any "final

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[1] Defendant argues for the first time in its supplemental memorandum that no portion of plaintiff's Motion for Partial Summary Judgment should be granted because defendant has uncovered a possibility that plaintiff's agent may have made a misrepresentation in applying for insurance from defendant. Defendant has not made a showing sufficient to carry a motion pursuant to Fed. R. Civ. P. 56(f) that it requires additional discovery to respond to plaintiff's motion.

adjudication based upon or arising out of any dishonest . . . acts or omissions committed by the Insured." The arbitrators determined that plaintiff's conduct, particularly the conflict of interest, was "below the level or propriety expected of a member of the Bar." Impropriety of a lawyer is or should be recognized as "dishonesty" within the meaning of the exclusion provision. Furthermore, the arbitral award is the subject of litigation pending in the United States Court of Appeals for the Ninth Circuit. *Arizona Electric Power Cooperative, Inc. v. Berkeley*, Case No. 93-16682. Thus, even if plaintiff were entitled to indemnification for the arbitrators' award against it, he could not prevail now, because the award is not final unless and until the Court of Appeals confirms it.

Plaintiff's contention that defendant's failure to represent plaintiff estops defendant from raising the exclusion provision to avoid its obligation to indemnify plaintiff is inapposite. The authorities plaintiff cites establish that an insurance carrier that has breached an insurance agreement cannot hold the insured to certain affirmative obligations under the agreement, e.g., to secure the carrier's approval before settling the claim. *See, e.g., American Fire & Casualty Co. v. Kaplan*, 183 A.2d 914 (D.C. 1962). Those authorities do not speak to the situation here, where defendant invokes against its duty to indemnify a circumstance — plaintiff's impropriety — that existed before the breach.

Accordingly, the plaintiff's prayer for a declaratory judgment that defendant is liable under the insurance contract on account of the 15% adjustment of the arbitral award must be denied.

Date: January 25, 1994

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

ORDER

[FILED, Jan 26, 1994, Clerk, U.S. District Court,
District of Columbia (Clerk's stamp)]

For the reasons stated in the accompanying Memorandum, it is this 25th day of January, 1994, hereby

ORDERED: that plaintiff's Motion for Partial Summary Judgment should be, and is hereby, GRANTED with respect to Count I of the Complaint; and it is further

ORDERED: that defendant's Motion to Dismiss should be, and is hereby, GRANTED with respect to Count II of the Complaint; and it is further

ORDERED: that plaintiff shall be entitled to recover his costs for his representation before the arbitration panel, described in Count I of the complaint, plus prejudgment interest; and it is further

ORDERED: that plaintiff may, on or before February 9, 1994, file and serve an itemization of his costs of representation from the arbitration proceeding and the prejudgment interest on those costs; and it is further

ORDERED: that defendant may, on or before February 19, 1994, file any response to plaintiff's itemization; and it is further

ORDERED: that each party shall bear its own attorney's fees for this action.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

ORDER

[FILED, Mar 8, 1994, Clerk, U.S. District Court,
District of Columbia (Clerk's stamp)]

An Order dated January 26, 1994 granted partial summary judgment for plaintiff and stated "that plaintiff shall be entitled to recover his costs for representation before the arbitration panel, described in Count I of the complaint, plus prejudgment interest." Plaintiff now moves for a clarification of that Order, which would state that plaintiff is additionally entitled to reimbursement of expenses that he incurred in responding to his former client's judicial appeals of the arbitration panel's ruling in plaintiff's favor.

The language of the Order is clear. Plaintiff is entitled to reimbursement only for "his costs for representation before the arbitration panel" and not for his former client's subsequent appeals of the arbitration panel's award to plaintiff. Those appeals of rulings in plaintiff's favor were not covered by plaintiff's insurance agreement with defendant, which promised coverage only for "any claim *against* [plaintiff] including the appeal thereof." Complaint, ex. A, p. 3 (emphasis added).

Accordingly, it is this 7th day of March, 1994, hereby

ORDERED: that plaintiff's Motion for Clarification should be, and is hereby, DENIED; and it is further

DECLARED: that the Order dated January 26, 1994 does not entitle plaintiff to reimbursement for his costs of representation in the judicial appeals from the arbitration panel's ruling.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

MEMORANDUM

[FILED, Jun 15, 1994, Clerk, U.S. District Court, District of Columbia (Clerk's stamp)]

Plaintiff, an attorney, initiated an arbitration proceeding in Arizona against his former client to recover fees the client allegedly owed him. The client filed a counterclaim, charging plaintiff with unethical conduct. Defendant, plaintiff's professional liability insurer, refused to provide plaintiff a defense against the counterclaim. The arbitration panel awarded plaintiff $9,225,000 but also ordered plaintiff to remit 15% of the award in satisfaction of the counterclaim. The arbitration award has been confirmed by the United States District Court in Arizona and remains under review by the United States Court of Appeals for the Ninth Circuit.

Plaintiff brought this action to recover the costs of his defense of the counterclaim before the arbitration panel and to seek indemnification against the panel's award on the counterclaim. Plaintiff's central contention was that his insurance contract with defendant obligated defendant to provide a defense against the counterclaim. An Order dated January 26, 1994 held "that plaintiff shall be entitled to recover his costs for his representation before the arbitration panel . . . plus prejudgment interest . . . ." Jan. 26, 1994 Order at 7. That Order also

denied plaintiff indemnification for the client's recovery against him. The Order instructed plaintiff to file an itemization of his defense costs and permitted defendant to respond. The parties have filed extensive briefs.

Plaintiff initially contends that he is entitled to recover from defendant all of his costs from the arbitration proceeding, including costs associated with prosecuting his original complaint, after the date the counterclaim was filed. Plaintiff argues that many of the resources he expended in defending against the counterclaim would have been necessary to make his affirmative case absent the counterclaim and that all of his expenses should therefore be attributed to the counterclaim.

Plaintiff's contention is without merit. Defendant's improper failure to provide a defense against the counterclaim does not entitle plaintiff to reimbursement for charges for which defendant would not have been liable had the counterclaim never been filed. Plaintiff cites several cases in which state courts allowed plaintiffs to recover all their defense costs although the defendant insurance companies had improperly failed to cover only parts of the defenses. These cases are inapposite, because they involve courts' refusals to segregate, not defense from prosecution costs, but merely distinct defense costs. *See, e.g., Voorhees v. Preferred Mutual Insurance Co.*, 588 A.2d 417 (N.J. Super. 1991), *aff'd*, 607 A.2d 1255 (N.J. 1992). Plaintiff also contends that an itemization of costs between his original claim and the counterclaim is impossible because the two claims present indistinguishable issues. But plaintiff's briefs belie this contention. He proposes an alternative approach for calculating recovery based on affidavits that segregate various costs of defending against the counterclaim. This approach provides a starting point for calculating plaintiff's proper recovery.

The parties do not dispute that plaintiff is entitled to recover the portion of his payments for fees and expenses to the law firm of Steptoe and Johnson ("Steptoe") that, according to an affidavit filed by Samuel

Sipe, a Steptoe partner, financed its work defending against the counterclaim. *See* Plaintiff's Memorandum Regarding Attorney's Fees and Costs ("Plaintiff's Mem."), Ex. 4. These payments, made at an agreed rate below Steptoe's ordinary billing rate, totalled $153,585.15. *See* Amendment to Plaintiff's Memorandum Regarding Attorney's Fees and Costs at 2. Plaintiff also seeks recovery of a portion of a contingent fee that was part of his agreement with Steptoe.[1] The contingent fee agreement was in place before the counterclaim was filed, and plaintiff has presented no evidence that the parties materially altered the contingent fee agreement after the filing of the counterclaim. The contingent fee was based, by definition, on plaintiff's recovery, which depended not on the counterclaim but on plaintiff's affirmative case. However, plaintiff correctly points out that the presence of the contingent fee arrangement decreased his aggregate payments to Steptoe in anticipation of the contingent fee. Defendant suggests that the appropriate way to compensate plaintiff for the risk he undertook by entering into the contingent fee arrangement is to reimburse plaintiff at Steptoe's full billing rate, rather than the reduced rate that Steptoe charged plaintiff in part because of the contingent fee arrangement, for the payments plaintiff actually made. This course of action appears sound. Plaintiff will be reimbursed for his payments to Steptoe in the amount of *$233,679.15.*[2]

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[1] Plaintiff's agreement with Steptoe does not require him to pay the contingent fee until he receives the arbitration award. Thus, the matter of the contingent fee would not be ripe for review if the contingent fee were treated as a separate issue. Determination of the matter here is appropriate because the contingent fee was contemplated by the overall agreement between plaintiff and Steptoe.

[2] This figure is based on defendant's calculation, without defendant's deduction of the insurance policy deductible, addressed below. *See* Defendant's Response to Plaintiff's Memorandum Regarding Attorney's Fees and Costs at 15 n.8. Plaintiff made no objection to this calculation in its Reply.

In addition, plaintiff seeks reimbursement for time and expenses his law partners, Richard Chaifetz and Howard Nelson, contributed to the defense against the counterclaim. Defendant argues that Chaifetz and Nelson cannot recover fees because of a policy provision requiring the insured to "assist . . . in the conduct of suits . . . without charge to" defendant. Complaint, Ex. A, p. 16. Plaintiff responds that only he, and not Chaifetz or Nelson, was named in the counterclaim. Reflecting this policy provision, plaintiff seeks no reimbursement for his own time spent on the defense against the counterclaim. Defendant has presented no authority for the proposition that the policy precluded Chaifetz and Nelson from recovering reasonable legal fees and expensed for their services in the defense of claims against plaintiff.

Plaintiff's request for $278,447.79 [3] to cover the work of Chaifetz and Nelson and related office expenses relies exclusively on the post-hoc recollections and estimates of the attorneys and the firm's bookkeeper. *See* Plaintiff's Mem., Ex's 2, 5, 6 (affidavits of bookkeeper Bernice Martin, Nelson, and Chaifetz). In the distinct setting of an application for attorney's fees after a judgment, the Court of Appeals for this Circuit has held that "the fee application must contain sufficiently detailed information about the hours logged and the work done . . . . Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees." *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

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[3] This figure incorporates a correction in an arithmetic error in plaintiff's memorandum. Plaintiff incorrectly gave the sum of $99,156.00 and $101,879.00 as $202,035.00, rather than $201,035.00. *See* Plaintiff's Mem. at 18. $201,035.00 plus plaintiff's claimed office expenses of $77,412.79 yields the aggregate claim of $278,447.79.

The lawyers' affidavits divide the litigation into several periods and estimate the time they spent on counterclaim work during each phase. Nelson's account of the period between March 9 and April 10, 1992 is representative:

> From the time the counterclaims were filed until the arbitration hearing concluded in August, 1992, I devoted approximately 95% of my time to the arbitration. During this period of time, I worked a minimum of 50 hours a week, usually more. . . . During the period of March 9 to April 10, when we filed our direct case, I estimate that 50% of my time was spent on issues relating to valuation and 50% was spent on issues that were raised by both our direct case and the counterclaim.

Plaintiff's Mem., Ex. 5, at 3-4. Nelson further states that "I did not keep contemporaneous records of my time because I was not being paid on an hourly basis and [defendant] had denied coverage under the firm's malpractice insurance coverage." *Id.* at 3. Chaifetz' estimates and representations are of a piece with Nelson's.

Chaifetz and Nelson clearly contributed substantial effort to the arbitration proceeding. *See* Plaintiff's Reply, Ex. 12 (letter from Samuel M. Sipe, Jr. to Richard I. Chaifetz dated May 5, 1994). The rule of *Concerned Veterans*, *supra*, does not govern the calculation of damages in this case. However, the concerns that case raises weigh against awarding plaintiff the full amount he seeks for his partners' work. The affidavits' estimates of total hours worked, hours spent on the arbitration proceeding, and percentages of time dedicated to the counterclaim are self-evidently rough. The affiants offer no basis for the estimates other than their recollections almost two years after the fact. In addition, the affiants' rough estimates are methodologically flawed, because they appear to count as counterclaim time all work that

contributed to the defense against the counterclaim, even if that work would have been necessary absent the counterclaim. Neither party has suggested a mathematically precise basis for awarding plaintiff some percentage of his request. Given plaintiff's insufficient support for the amount requested, justice is best served by awarding plaintiff half his requested amount. This approach rewards the work of plaintiff's partners while preventing any windfall to plaintiff from his and their inadequate record keeping. Accordingly, plaintiff will be reimbursed for the work of his partners and related office expenses in the amount of *$139,223.90.*

Finally, plaintiff seeks reimbursement for out-of-pocket expenses paid to five expert witnesses, for which he has presented documentation. *See* Plaintiff's Reply to Defendant's Response to Plaintiff's Memorandum Regarding Attorney's Fees and Costs ("Plaintiff's Reply"), Ex. 11. Of these witnesses, three—James Kiely, M.K. O'Toole, and Thomas Brosnan—are experts in the field of energy law, whose assistance presumably would have been necessary absent the counterclaim. Plaintiff has made no attempt to demonstrate that particular percentages of their fees and expenses were attributable to defending against the counterclaim. The two other witnesses, Professors Steven Gillers and Lester Brickman, are experts in the field of legal ethics, an area that only became relevant to the arbitration proceeding because of the counterclaim. Plaintiff's documentation shows total expenditures for these witnesses of $39,076.92 for Gillers and $5,843.85 for Brickman. Accordingly, plaintiff will be reimbursed for expert witness fees in the amount of *$44,920.77.*

Defendant seeks to reduce plaintiff's recovery by $25,000, the amount of the deductible in plaintiff's insurance contract with defendant. Plaintiff points out that the contract permitted defendant to charge the deductible only once per policy year and only once in

connection with two or more matters "arising out of a single act . . . or a series of related acts . . . ." Complaint, Ex. A, p. 15. Plaintiff states that the same former client involved in the arbitration proceeding brought a civil action against him based on the same contentions that gave rise to the arbitration counterclaim during the same policy year it brought the counterclaim. Plaintiff has presented evidence of legal expenses totaling $11,436.41 in defense of that claim after defendant authorized plaintiff's counsel, none of which defendant reimbursed. Plaintiff's Reply, Ex. 10. Defendant concedes that plaintiff has paid that amount toward the deductible. Plaintiff's recovery will therefore be decreased by the balance of the deductible for which plaintiff is liable, *—$13,563.59.*

Accordingly, the accompanying Order directs defendant to pay plaintiff the amount of *$404,260.23.*

Date: June 15, 1994

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

ORDER

[FILED, Jun 15, 1994, Clerk, U.S. District Court,
District of Columbia (Clerk's stamp)]

For the reasons stated in the accompanying Memorandum, it is this 15th day of June, 1994, hereby

ORDERED: that, pursuant to the Order dated January 26, 1994, defendant shall pay to plaintiff the amount of *$404,260.23*, plus prejudgment interest; and it is further

ORDERED: that the parties shall attempt to agree on a proposed Order awarding a calculated amount of prejudgment interest and shall, on or before *July 1, 1994*, file any proposed Order to which they have agreed; and it is further

ORDERED: that, if the parties are unable to agree on a proposed Order on or before *July 1, 1994*, each shall, no later than that date, file and serve on the opposing party a preferred proposed Order, and each may, on or before *July 8, 1994*, file a Memorandum stating any objections to the opponent's preferred proposed Order.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

ORDER

[FILED, Jul 14, 1994, Clerk, U.S. District Court,
District of Columbia (Clerk's stamp)]

An Order dated June 15, 1994 entered judgment on behalf of plaintiff in the amount of $404,260.23. That Order instructed the parties to agree on a proposed order awarding prejudgment interest. The parties on July 7, 1994 filed a stipulation indicating their agreement "that the appropriate amount of prejudgment interest through June 30, 1994 is $30,419.39." Accordingly, it is this 13th day of July, 1994, hereby

ORDERED: that plaintiff shall have judgment in the amount of $30,419.39 in prejudgment interest.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Exhibit "E"
1 of 3

American Arbitration Association
333 East Osborn Road, Suite 310, Phoenix, AZ 85012-2365
Telephone (602) 234-0950 • Fax: (602) 230-2151

COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
Arnold D. Berkeley, P.C.

Claimant,

-AND-

Arizona Electric Power Cooperative, Inc.

Respondent.

CASE NUMBER: 76-194-0108-91

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated January 27, 1979 and April 1, 1981 (and amended and clarified thereafter) and having been duly sworn and having duly heard the proofs and allegations of the Parties, FIND as follows:

The contingent fee agreement in this proceeding, as amended, encompassed benefits occurring over a ten year period ending August 31, 1991 with no interest on unpaid fees with the exception of that pertaining to the Ignition Fuel and Flame Stabilization Gas obtained by Claimant for Respondent as the result of the Damage Case against El Paso Natural Gas Company.

Accordingly, Arbitrators Pfeiffer and Simons AWARD as follows:

Respondent, Arizona Electric Power Cooperative, Inc., shall pay to Claimant, Arnold D. Berkeley, P.C., the sum of Nine Million Two Hundred Twenty One Thousand Dollars and No Cents ($9,221,000.00) for Claimant's claim in this arbitration.

9/18/92 /s/ Morton L. Simons
DATED Morton L. Simons, Esq.

9/21/92 /s/ Paul N. Pfeiffer
DATED Paul N. Pfeiffer, Esq.

The Award of the majority of the Panel on the main claim is not supported by its premises, in my opinion.

9/17/92 /s/ William F. Young, Jr.
DATED William F. Young, Jr., Esq.

[Page] 2 of 3

With respect to the Counterclaim, a majority of the Panel FINDS as follows:

The conduct of Claimant, a senior member of the Bar, first in employing Respondent's former general manager, while continuing to represent Respondent, to assist in the preparation of the instant claim without notifying Respondent; second, in filing an arbitration demand with the American Arbitration Association for fees in excess of $67,000,000 without first consulting Respondent; and finally, by continuing to represent his client, the City of Willcox, Arizona in opposition to Respondent in a litigation in which the City was attempting to hold Respondent's gas supply hostage, when considered together, constitute conduct below the level of propriety expected of a member of the Bar. Accordingly, Claimant is directed to remit 15% of the Award in this Arbitration to Respondent in satisfaction of the Counterclaim herein.

9/17/92 /s/ William F. Young, Jr.
DATED William F. Young, Jr., Esq.

9/21/92 /s/ Paul N. Pfeiffer
DATED Paul N. Pfeiffer, Esq.

Arbitrator Simons dissents as to the disposition of the Counterclaim, in which the majority requires Claimant to remit 15% of the Award to Respondent.

First, I do not believe this panel has jurisdiction to act as a disciplinary board, much less to impose sanctions no disciplinary board would impose.

Second, I find no reasoned basis for a finding of liability on the Counterclaim. There is no rule of law or logic that makes an attorney's preparation of a fee claim improper, and it is unclear how Claimant's retention of Respondent's former General Manager somehow makes an otherwise proper action improper. The majority's condemnation of Claimant's action in filing an arbitration claim for $67,000,000 "without first consulting Respondent" not only fails to provide a basis for liability, but is ironic, to say the least: Clearly the filing of an arbitration demand is not improper; if the full amount of a "large" claim is not proven to the satisfaction of the panel, it can and will be reduced; and neither the Association's rules nor any other cognizable standard requires prior consultation before a demand may be filed. Finally, the facts of Claimant's representation of Willcox appear to be vastly overblown—assuming disqualification was required, it has already been accomplished by the Arizona court, which imposed no other sanction.

Third, I find no basis in the record for a finding that Claimant's conduct damaged Respondent in the amount of $1,383,150, or any other sum.

9/18/92 /s/ Morton L. Simons
DATED Morton L. Simons, Esq.

The awarded monetary sums are due and payable within 30 days from the date of this Award and shall thereafter accrue post-Award interest at the rate of 8% per annum until paid.

The administrative fees and expenses of the American Arbitration Association totaling $62,992.10 shall be borne equally by the parties.

The compensation of the neutral arbitrator totaling $18,796.00 shall be borne equally by the parties.

This Award is in full settlement of all claims and counterclaims submitted to this arbitration.

Exhibit "F"

OFFICE OF BAR COUNSEL
THE BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS
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BAR COUNSEL
Leonard H. Becker

DEPUTY BAR COUNSEL
Wallace E. Shipp, Jr.

March 26, 1993

CONFIDENTIAL

Arnold D. Berkeley, Esquire
9748 Avenel Farm Dr.
Potomac, Maryland 20854

Re: Berkeley/Slover; Webster
Docket No. 478-92

Dear Mr. Berkeley:

This office has completed its investigation of the above-referenced matter. Because your conduct reflected a disregard of certain ethical standards, we are issuing to you this Informal Admonition pursuant to Rule XI, Sections 3, 6, and 8 of the District of Columbia Court of Appeals Rules Governing the Bar.

By letter dated October 16, 1992, from William L. Slover, Esquire and David N. Webster, Esquire, this office was advised of an award of the American Arbitration Association in a matter involving you and another member of the Bar, and styled *Arnold D. Berkeley, P.C. v. Arizona Electric Power Cooperative, Inc.*, Case No. 76-194-0108-91. Two of the three arbitrators, with the third

arbitrator dissenting, awarded the claimant $9.221 million on a contingent fee agreement. A differently constituted majority of the panel then awarded a remittitur of 15% of the aforesaid award to the respondent on its counterclaim, reciting:

> "The conduct of Claimant, a senior member of the Bar, first in employing Respondent's former general manager, while continuing to represent Respondent, to assist in the preparation of the instant claim without notifying Respondent; second, in filing an arbitration demand with the American Arbitration Association for fees in excess of $67,000,000 without first consulting Respondent; and finally, by continuing to represent his client, the City of Willcox, Arizona in opposition to Respondent in a litigation in which the City was attempting to hold Respondent's gas supply hostage, when considered together, constitute conduct below the level of propriety expected of a member of the Bar."

This office also was made aware of a civil action commenced by Arizona Electric Power Cooperative ("AEPCO") against the Respondent and other attorneys in the United States District Court for the District of Columbia, styled *AEPCO v. Berkeley*, C.A. No. 91-2149 (the "Civil Action"), in which, broadly speaking, the plaintiff sought interim and permanent injunctive relief to preclude the defendant attorneys from continuing their representation of the City of Willcox adversely to AEPCO's interests. The Court denied the motion for interim relief for want of irreparable injury but provisionally agreed that the plaintiff had made out a strong showing of a breach of the disciplinary rule governing conflicts of interest.

On the strength of the arbitration award, we docketed the matter for investigation and called upon you for a response. We received your response under cover of a letter dated November 25, 1992. As described more

particularly below, we find that your conduct violated Rule 1.9 of the Rules of Professional Conduct.

1. *Retention of client's employee.* The arbitral majority found fault in your retention of the former general manager of AEPCO, while still representing the client, to assist in preparing the claim against AEPCO. AEPCO's expert witness thought that contacting the former employee and retaining him pursuant to a consulting agreement six months after he was terminated by AEPCO breached a duty of loyalty owed AEPCO (Hazard direct, at 19 (A0472)). Your expert witness in the arbitration proceeding could not identify an ethical proscription violated by this practice (Gillers Q. 37). We concur in the view expressed by Professor Gillers. Unless you breached a disciplinary rule by preparing and asserting a claim for contingent fees against AEPCO (which, we conclude below, you did not), the retention of a former AEPCO employee to assist in that exercise does not violate any provision of the D.C. Code or Rules.

2. *Assertion of claim without notice.* The arbitral majority next found error in your submission of a claim for a fee in arbitration without first notifying the former client. AEPCO's expert witness argued that the failure to disclose the impending claim to AEPCO or its auditors was dishonest conduct (Hazard direct, at 20 (A0473). Your expert witness noted that the auditor's inquiry called for a response concerning matters "with respect to which you have been engaged," and opined that because you obviously had not been engaged by AEPCO to press a contingent fee claim against AEPCO, you had no duty to disclose the matter to the auditor (Gillers Q. 38). Again, we concur in the view expressed by Professor Gillers. The Code and Rules contemplate that an attorney may prepare a bill for a current client. That exercise necessarily entails considerations that the client might view as not congruent with its interests. If the bill is disputed, the lawyer is not required to withdraw or to

advise the client to obtain separate representation before the lawyer seeks to settle the matter.

3. *Representation of City of Willcox.* The arbitral majority lastly criticized your representation of the City of Willcox in a contract dispute with AEPCO. It appears that for a period of time you represented both AEPCO and the City of Willcox in connection with their power arrangements. The complainants assert in particular that you committed disciplinary misconduct when, in a proceeding before the Federal Energy Regulatory Commission to approve a proposed agreement between AEPCO and El Paso Natural Gas Company, the ultimate source of the power in question, you asserted an objection on behalf of the City of Willcox, based upon the City's alleged right to exercise or withhold its consent to a direct pass-through of the power.

On your behalf, it is contended that, although your law firm had represented AEPCO in connection with the contract negotiation, the firm "had not participated in the drafting or negotiation of the contract provision in question" — a provision that governed the rights of the City as intermediate recipient of noninterruptible power to exercise or withhold its consent in the event that AEPCO sought to undertake a direct relationship with El Paso.

(a) Rule 1.7 of the D.C. Rules of Professional Conduct governs conflict situations between or among present clients. Inasmuch as AEPCO's expert witness conceded in the arbitration proceeding that he was not aware of any conflict that arose prior to the termination of your representation in June 1991 (Hazard direct at 23 (A0476)), we cannot say that we have clear and convincing evidence to the contrary.

(b) Rule 1.9 of the D.C. Rules provides:

> "A lawyer who has formerly represented a client in a matter shall not thereafter represent another

person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

(i) You contend that your firm did not draft the "intermediate consent" provision at issue. Thus, the firm was not in the position of rendering conflicting advice to its clients concerning the interpretation of Willcox's right (or lack thereof) to interpose an objection to the proposed direct relationship between AEPCO and El Paso. This fact alone, even if true, would not excuse what would otherwise be a violation of the Rule. The application of the Rule does not depend upon the prior imparting of advice, but upon the subsequent representation of interests materially adverse to those of the former client in the same or substantially related matter.

(ii) You contend that the mere fact of the dual representation did not preclude you from asserting subsequently Willcox's interpretation of the disputed contract provision, because in your view that issue did not bear a "substantial relation" to the prior representation of AEPCO. We disagree. The position taken on behalf of Willcox was that the City could interpose an objection to AEPCO's direct dealings with El Paso. That position bore a direct and substantial relationship to the dealings among the three entities with which a significant portion of your representation of AEPCO had concerned itself. The fact, which you asserted in your response to questions put to you during the arbitration proceeding, that you advised AEPCO (albeit erroneously, in your view) that it did not need to secure Willcox's approval for direct dealings with El Paso under the terms of a trilateral agreement, rather than under the terms of another agreement, known as the service agreement (which you deny that you or your law firm had a role in drafting), does not render the successor representation of Willcox unrelated to the prior representation of AEPCO.

(iii) You contend that because you had jointly represented AEPCO and Willcox, you were free to use information acquired in the joint representation for the benefit of one of the clients against the other. We agree that as between two jointly represented clients on a given matter, neither client may claim a justifiable expectation of confidentiality vis-a-vis the other. However, Rule 1.9 serves a purpose beyond that of protecting the former client's confidence. The Rule also preserves the client's legitimate expectation that the lawyer's duty of loyalty, embodied in his or her fiduciary obligation to the client, precludes the attorney's taking a position adverse to the client on the very matter on which the attorney previously represented the client, or on a substantially related matter. We find no provision either in Rule 1.9 or in the accompanying commentary that would warrant an exception to the Rule for those cases where the attorney has switched sides at the behest of a former client, previously aligned with the aggrieved client as part of a dual representation but now adverse to it.

(iv) Your expert concedes that if your law firm advised AEPCO that it had a right under the agreement to become El Paso's direct customer without let or hindrance by Willcox, and if the advice so given pertained to the contract negotiated by the law firm, then the firm

> "should not oppose the former client in an action over the construction of a clause that the firm had previously construed for that client. This would be so even if the firm had not drafted the clause" (Gillers Q. 45).

Your expert further acknowledges that in the circumstance described above, the consequence "must be" disqualification of the firm (*id.*). Given our disposition, we find it unnecessary to determine the factual premises of the expert's concession in order to conclude that your conduct violated the Rule.

4. In addition to the foregoing items, we note an issue arising from your having asserted a claim in arbitration against AEPCO while still representing the client. Your expert opined:

> "Ordinarily, it is disloyal to sue a current client, whether for oneself or another. Simply put, a client can hardly be expected to work with a lawyer who is, or who is representing, its adversary, even on an unrelated matter. Where the lawyer is himself the adversary, the lawyer will ordinarily have to resign before bringing suit" (Gillers Q. 39).

Nonetheless, the expert believed that mitigating circumstances obtained in this case (*id.*). Of the proffered arguments, the one we find controlling is found in the contingent fee agreement between your firm and AEPCO. That agreement provided in Sec. 13.1 that "pending arbitration between the parties hereto, there shall be no cancellation or forfeiture of this Agreement." Because the agreement itself contemplated disputes between attorney and client and made provision for their resolution during an ongoing representation, we cannot say that pursuit of your claim in arbitration, without more, constituted an ethical breach. *See* Rule 1.7(b)(4) & (c).

We have carefully considered the other claimed breaches of duty asserted by AEPCO's expert witness in his testimony at the arbitration proceeding and find his arguments to be without merit.

This letter constitutes an Informal Admonition pursuant to Rule XI, §§ 3, 6 and 8 of the Rules of the District of Columbia Court of Appeals Governing the Bar.

Please refer to the attachment to this letter of Informal Admonition for a statement of its effect and your right to have it vacated and have a formal hearing. Such a hearing could result in a recommendation to dismiss the charges against you or a recommendation for a find-

ing of culpability, in which case the sanction recommended by the committee is not limited to an Informal Admonition.

If you do wish a formal hearing, you must request it in writing, which must be filed with the Board on Professional Responsibility, 515 Fifth Street, N.W., Building A, Room 101, Washington, D.C. 20001 within 14 days of the date of this letter, unless an extension is granted.

The complainant or other recipient of a copy of this Informal Admonition is reminded that under Section 17(a) of Rule XI of the District of Columbia Court of Appeals Governing Members of the Bar, this disciplinary proceeding, including the issuance of the above Informal Admonition, remains confidential unless and until such confidentiality is waived by the respondent attorney. The complainant or other recipient is not prohibited by this Rule to make use of whatever knowledge he or she may have developed or received from sources other than this proceeding and is otherwise at liberty to use concerning the underlying transactions or events that gave rise to this matter.

Our investigation of the other attorney referred to in the arbitration award has proceeded under a separate docket.

Sincerely,
/s/ Leonard H. Becker
Leonard H. Becker
Bar Counsel

Enclosure

cc.: David N. Webster, Esquire
William L. Slover, Esquire

Sent Certified and Regular Mail

LHB:tab